No. 86-1636

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

VS.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Nominal Respondent,
AND
DANIEL M. GOTTLIEB,
Real Party in Interest.

BRIEF OF ALLAN CARR AND DANIEL M. GOTTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiff Allan Carr ("Carr") and Third Party Defendant and Real Party in Interest Daniel M. Gottlieb ("Gottlieb") respectfully submit this Brief in opposition to the Petition of Cadwalader, Wickersham & Taft ("Cadwalader") that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus, entered October 24, 1986.

For the reasons more fully stated below, the order entered March 7, 1986 by the United States District

Court for the Central District of California (the "Respondent Court") is not clearly erroneous as a matter of law. Of equal importance, Cadwalader fails to show any exceptional circumstances sufficient to invoke this Court's jurisdiction over an interlocutory discovery order or that its right to issuance of a writ of mandamus is "clear and indisputable." The Petition should therefore be denied.

OPINIONS BELOW

Supplementing the orders set forth in the Appendix to the Petition, the order of the court of appeals under Fed. R. App. P. 21(b) requiring Gottlieb to answer Cadwalader's petition for a writ of mandamus appears in Appendix A, *infra*, p. 1a. The district court's "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, Denying Defendant Cadwalader, Wickersham & Taft's Motions for Change of Venue and for Sanctions and Discovery," entered September 26, 1984, is set forth in Appendix C, *infra*, pp. 4a-13a.

THE STATUTES, RULES AND REGULATIONS THE CASE INVOLVES

The following statutes, rules and regulations are of particular relevance to this proceeding and are set forth in Appendix E hereto: Federal Rule of Civil Procedure 26(b)(3); Federal Rule of Evidence 501; California Corporations Code § 25102(f) (West 1977), *amended by* 1981 Cal. Stat., ch. 1120, § 1 (effective Nov. 1, 1981); California Corporations Code §§ 25110, 25504 & 25504.1 (West 1977 & Supp. 1987); California Administrative Code, title 10, § 260.102.2 (1980) (amended effective Nov. 1, 1981).

STATEMENT OF THE CASE

A. NATURE OF THE PRESENT PROCEEDING

Over two years ago, on May 17, 1985, Daniel M. Gottlieb, Carr's attorney-in-fact and business manager, personally served on Cadwalader a request for production of documents. Among other things, that request demanded the production of documents Cadwalader had used in preparing two purported private placement memoranda on behalf of Defendant Sentinel Government Securities (the "Partnership"); all correspondence which Cadwalader had received from or transmitted to the Sentinel Defendants; [1] and the records of any due diligence investigations it had conducted in connection with the two securities offerings made by the Partnership.

On June 27, 1985, Cadwalader served a response in which it objected, both generally and specifically, to each of Gottlieb's document requests on a number of different grounds. Notwithstanding these objections, on July 15, 1985 — a total of fifty-eight days after Gottlieb's request had been personally served on its counsel — Cadwalader produced documents in response to nine of Gottlieb's requests. With respect to the remaining document requests, however, Cadwalader categorically refused to produce or even identify any documents responsive thereto. As a result, on September 11, 1985, Gottlieb filed a motion to compel production of documents.

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[1] At all material times herein, the general partners of the Partnership were Defendants Sentinel Financial Instruments, a New York general partnership ("SFI"); SGS, Inc., a Connecticut corporation; and Michael M. Senft ("Senft"). The Partnership and its general partners are collectively referred to herein as "Sentinel" and the "Sentinel Defendants."

The motion was heard on September 30, 1985 before the Honorable James J. Penne, United States Magistrate. Contrary to the Petitioner's repeated inferences that the Respondent Court wholly abrogated the attorney-client privilege and ordered disclosure of all documents requested, the magistrate in fact denied a number of Gottlieb's requests. The requests that were denied included each of those set forth in the application Cadwalader filed with this Court on March 2, 1987[2] and which collectively called upon Cadwalader to produce "any and all" documents it received from or transmitted to Sentinel. Rather, as exemplified in Cadwalader's own transcription of the September 30, 1985 hearing, Magistrate Penne refused to compel production on those three requests on the ground that "[t]hey're too broad [and] . . . not limited to this particular transaction that is involved at issue in this case." (App. B, *infra*, p. 2a).

On the other hand, during the hearing the magistrate chastised Cadwalader for its complete failure to identify the documents which it claimed were privileged.

> You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

Id. at 2a-3a.

Adopting the form of order submitted by Cadwalader, on November 12, 1985, the magistrate entered an order

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[2]Application for Extension of Time to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, dated March 2, 1987, ¶ 5.

granting in part and denying in part Gottlieb's motion to compel production of documents. (Petition, App. A). Cadwalader timely objected to that order on a number of different grounds. However, the principal thrust of its argument before the Honorable William D. Keller, United States District Judge, was that "Magistrate Penne's sole rationale for overruling [Cadwalader's] objections was that the documents requested were 'at issue in a lawsuit' and that 'the need for the information' outweighs 'the policy behind the attorney-client privilege.' " *Cf.* Petition at 5 ("the magistrate based his ruling solely on the grounds of relevance and need").

In the "Order re Objections to Magistrate's Order," entered March 7, 1986 (the "Order") (Petition, App. C), the Respondent Court affirmed Magistrate Penne's order in its entirety and overruled each of Cadwalader's objections. Although noting the validity under Federal Rule of Civil Procedure 26(b)(3) of "the balancing approach referenced by Magistrate Penne at the oral hearing on the Motion to Compel," clearly, in drafting the Order Judge Keller also relied heavily upon the factual showing and legal reasoning set forth in Gottlieb's original moving papers and the declarations and exhibits filed in support thereof. Thus, for example, the Respondent Court's findings that "defendant Michael M. Senft was convicted of a single conspiracy that included both Sentinel Government Securities ('SGS') and Sentinel Financial Instruments ('SFI') . . . [and] the activities of SFI and SGI [sic] were apparently intertwined" (Petition, App. C at 6a) are copied almost verbatim from language used by the Second Circuit Court of Appeals in its decision affirming Senft's criminal convictions of tax fraud. (App. D, *infra*, pp. 14a-21a).

On June 17, 1986, Cadwalader filed a petition requesting the Ninth Circuit to vacate the Order or, in the alternative, to direct the Respondent Court "to conduct an *in camera* review of the documents prior to any disclosure . . . ." [3] Pursuant to Fed. R. App. P. 21(b), on August 4, 1986, the court of appeals entered an order requiring Gottlieb to answer the petition. (App. A, *infra*, p. 1a). Collectively, the parties herein placed before that court literally hundreds of pages of relevant declarations, exhibits and other evidence. After due consideration thereof, on October 24, 1986, a three-member panel of the Ninth Circuit denied the petition finding that Cadwalader "has not demonstrated that the district court had clearly erred in compelling the production of documents." (Petition, App. D at 9a). On December 18, 1986, the Ninth Circuit denied Cadwalader's petition for a rehearing *en banc*.

B. STATEMENT OF FACTS

Defendant Sentinel Government Securities was organized on June 16, 1980. That autumn, the Partnership retained Cadwalader, its general counsel, to prepare a purported "Private Placement Memorandum" (the "Offering Memorandum") in connection with the offer for sale of 150 limited partnership interests.

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[3] As discussed more fully at pp. 24-25, *infra*, Cadwalader's claim that it "specifically offer[ed] the documents for *in camera* inspection" (Petition at 5) is as factually unsupported, as it is unsupportable. To the contrary, except for one fleeting reference buried within its 35-page memorandum in support of its objections to Magistrate Penne's order (*id.* at 5 n.2), before the Respondent Court Cadwalader steadfastly refused to produce or even identify any of the documents it asserts are privileged, and it never offered to disclose any of its work product for *in camera* inspection.

The Offering Memorandum was intended to be and was in fact distributed within the State of California and circulated among broker-dealers, investment advisers and other members of the public. Ultimately, over thirty California residents purchased limited partnership interests in the Partnership — more than any other state in which the securities were offered.

An integral part of the Offering Memorandum was a draft opinion letter prepared over Cadwalader's signature and partially dated October __, 1980 (the "opinion letter"). The opinion letter discussed in detail the probable tax consequences of the Partnership's operations, and Cadwalader knew that it would be relied upon by potential investors in their tax planning.

Relying upon the representations contained in the Offering Memorandum, Gottlieb purchased three "Units" in the Partnership on Carr's behalf on November 12, 1980. However, the Offering Memorandum and opinion letter omitted to state certain material facts — most notably, that Sentinel intended to engage in billions of dollars in false and arranged trading transactions between the Partnership and affiliated entities (including defendant SFI) as part of a fraudulent scheme to create fake tax write-offs.

To be accepted as a limited partner, each of the potential investors in the Partnership was required to execute a Subscription Agreement stating that he understood that "the offering and sale of the Units are intended to be exempt from registration under the Securities Act of 1933 . . . and from registration and/or qualification under any applicable state securities laws . . ." In truth, however, at the time of the offer for sale and sale of the Units to Carr, the Units were not, and still are not, qualified (nor

exempt from qualification) with the California Department of Corporations.

Subsequently, Cadwalader prepared another purported "Private Placement Memorandum," dated October 28, 1981, in connection with a second offering of securities in the Partnership. Less than three weeks later, however, that offering was abruptly withdrawn when the Internal Revenue Service seized books and records of the Partnership and of SFI and commenced an investigation into the trading activities of those two entities. That investigation resulted in an indictment filed two years later charging Senft and four other managers of the Partnership and SFI with perpetrating the then largest criminal tax fraud in United States history.

Following a four-week trial and six days of deliberations, the jury in the criminal action against Senft and the four other Sentinel managers was deadlocked. Consequently, the trial judge accepted a partial verdict convicting Senft of fourteen counts of tax fraud and declared a mistrial as to each of the other counts against him. Senft was sentenced to fifteen consecutive years imprisonment and total fines of $80,000 and is currently incarcerated at the federal correctional facility in Danbury, Connecticut. On March 29, 1985, the Second Circuit upheld Senft's convictions (App. D, *infra*, pp. 14a-21a), and, on November 4, 1985, this Court denied his petition for a writ of certiorari.

Eleven days before Senft was indicted by the Government, Carr commenced his lawsuit in the Respondent Court. In his Second Amended and Supplemental Complaint, Carr sets forth eight separate claims for relief against Cadwalader arising under federal and California securities laws, and for common law fraud, negligent misrepresentation and legal malpractice. In sum, the

complaint charges that Cadwalader intentionally or with a reckless disregard for the truth participated in and/or materially aided and abetted Sentinel's scheme and course of conduct to sell unqualified securities within the State of California and to defraud the limited partners of the Partnership. Carr further alleges that, in violation of its professional responsibility and the duty it owed to Plaintiff and other investors, Cadwalader failed to exercise reasonable care and due diligence in the preparation of the Offering Memorandum and opinion letter.

In answering the complaint, Cadwalader candidly admits that the Offering Memorandum offered for sale within the State of California 150 limited partnership interests in the Partnership and that these securities were not qualified with the California Department of Corporations. However, it also affirmatively alleges that: (1) The Units were not required to be qualified under the California Corporate Securities Law of 1968; and (2) "If, as plaintiff alleges, he was the victim of any fraud, Cadwalader was the victim of the same fraud" and is therefore entitled to indemnification or contribution.

On October 15, 1984, Cadwalader filed a Cross-Claim and Third-Party Complaint against Sentinel and Gottlieb, respectively, for indemnity and contribution. Cadwalader's Third-Party Complaint alleges that Gottlieb failed to conduct a diligent investigation regarding the Partnership and California blue sky law before purchasing the Units on Carr's behalf and, in effect, charges that he had no right to rely upon the opinion letter and Private Placement Memorandum that Cadwalader itself had prepared.

On February 8, 1985, the Respondent Court entered a "Stipulation and Order re Preservation of Confidential Information." In essence, that order provides that any

information designated as "confidential material" by the producing party shall be used solely for the purpose of the action and may be disclosed only to attorneys of record, third-party experts and parties and to the court under seal.

SUMMARY OF ARGUMENT

I. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. Claims of privilege do not enjoy a special status in considering a petition for an extraordinary writ, and the party seeking mandamus has the burden of showing that its right to issuance of the writ is "clear and indisputable." Mere error, even gross error, is insufficient. If there is any legal theory which could support the Respondent Court's ruling, it must be affirmed.

II. To overcome a claim of privilege using the crime-fraud exception, the proponent must merely make a prima facie showing that the legal advice has been obtained in furtherance of an illegal or fraudulent activity and need not actually prove the disputed fact. In light of the criminal tax fraud convictions of Michael M. Senft and the defendants' admissions that Sentinel Government Securities offered for sale within California 150 limited partnership interests without qualifying these securities, there was substantial evidence to support the Respondent Court's factual conclusions.

III. The fiduciary obligations among partners are stronger than the policy favoring privileged communications. A partner charged with acting inimically to the partnership's interest is thus not entitled to claim the attorney-client privilege against his own partners in an action to determine the proper functioning of his actions.

IV. By definition, the work product doctrine only applies to documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3). Every court of appeals that has addressed the application of the crime-fraud exception to work product has concluded that it does apply. The work product doctrine is also abrogated when it is the very activities of counsel of which plaintiff complains or when necessity and good cause is shown.

V. Cadwalader's untimely request for an *in camera* review is not properly before this Court. In any event, a "failure" to review assertedly privileged documents *in camera* does not constitute an abuse of discretion.

ARGUMENT

I.

THE SCOPE OF REVIEW: CADWALADER MUST SHOW THAT ITS RIGHT TO ISSUANCE OF A WRIT IS CLEAR AND INDISPUTABLE

A. A Claim of Privilege Does Not Enjoy Special Status in Considering Whether the Drastic Remedy of Mandamus Should Have Been Granted.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), *aff'g* 511 F.2d 192 (9th Cir. 1975). Mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). This standard has been "repeatedly reaffirmed in cases such as *Kerr* and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953)." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (citations omitted).

Since "[a]s a general proposition, discovery orders are not jurisdictional [,they] thus may not be reached under traditional concepts of mandamus except in the most extraordinary circumstances." *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). *Accord, In re Banker's Trust Co.*, 775 F.2d 545, 547 (3d Cir. 1985). Indeed, to hold otherwise invites "the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts . . . ." *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 284 (2d Cir. 1967).

"The contention that the claim of privilege enjoys a special status in considering a petition for an extraordinary writ has been expressly rejected by the United States Supreme Court in *Will v. United States*, 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)." *City of Los Angeles v. Williams*, 438 F.2d 522, 522-23 (9th Cir. 1971). In *Barclaysamerican Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984), the defendants in a civil suit for alleged federal and state securities laws violations petitioned for a writ of mandamus or prohibition to vacate a district court order directing the disclosure of documents which were assertedly protected by the attorney-client privilege or the work product doctrine. Holding that the showing of the extraordinary circumstances required for the writ had not been made, the Tenth Circuit observed:

> [T]he instant case involves a discovery dispute between private litigants. We cannot say that a question of substantial importance to the administration of justice is at issue.
>
> * * *
>
> [As in *Will v. United States*, 389 U.S. 90 (1967)], there is [also] no evidence that the trial judge has a

> general policy of ordering production of information protected by the attorney-client privilege or work product doctrine. . . .

Id. at 655.

Yet, even if the Court were to accept Cadwalader's conclusionary statements that the decision below "presents a serious threat to the attorney-client privilege and the work product doctrine" (Petition at 13) and later appeal is clearly an inadequate remedy, in addition, "[i]t is essential that the moving party satisfy 'the burden of showing that its right to issuance of the writ is "clear and indisputable." ' " *Calvert Fire Ins. Co.*, 437 U.S. at 662 (citations omitted). This burden Cadwalader does not—for indeed it cannot — meet.

B. The Order Must Be Affirmed If There Is More Than One Permissible View of the Evidence and There Is Any Legal Theory Which Could Support the Ruling.

Will v. United States, 389 U.S. 90 (1967) and *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) make plain that mere error, even gross error in a particular case, does not suffice to support issuance of a writ of mandamus. *United States v. De Stefano,* 464 F.2d 845, 850 (2d Cir. 1972). Indeed, even "[i]f we assume . . . that the judge is wrong on all points, his wrongness would be the kind of error, grounded on differing perceptions of where lines should be drawn, which would be grist for the appellate but not for the mandamus mill." *United States v. Kane*, 646 F.2d 4, 10 (1st Cir. 1981).[4]

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[4] *See also* Mid-America's Process Serv. v. Ellison, 767 F.2d 684, 686 (10th Cir. 1985) (appellate review of civil judgment could correct any impermissible consequences of trial court's allegedly improper ruling on privileges); *In re United States (Peck)*, 680 F.2d 9, 12 (2d Cir.

Nevertheless, Cadwalader argues that "mandamus, although an exceptional remedy, should be used where there is a clear error in the court below. . . ." (Petition at 15). The "clearly erroneous" standard of review, however, "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Id. at 573-74 (citations omitted).

Second, under the "clearly erroneous" standard, "it is well-established that if any ground exists which would support" the Order, it must be affirmed. *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1248 (9th Cir. 1979). In this regard, Cadwalader asserts that "the magistrate based his ruling solely on the grounds of relevance and need" (Petition at 5), and, subsequently, Judge Keller "address[ed] issues which were not considered by the magistrate" (*id.*) and "ignored" arguments it had raised

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1982) (district court's denial of Government's privilege claim is reviewable on appeal but does not constitute a "usurpation of power" warranting mandamus).

(*id.* at 6). At the outset, counsel for Carr and Gottlieb do not profess to have the same powers of telepathy as claimed by their learned opponents and would not presume to divine all of the factors Magistrate Penne and Judge Keller considered in reaching their respective decisions. Yet, it is not critical that we delve into the psyches of these two learned jurists for "in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' " *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

When, as here, a trial judge is not required to enter supporting findings of facts and conclusions of law and "there could be other unarticulated bases for the . . . order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion. . . ." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 37 n.3 (1980).

Likewise, in the instant case, it simply cannot be gainsaid that the Respondent Court's account of the evidence is plausible in light of the record viewed in its entirety and that Gottlieb has advanced at least one legal theory which would support the Order. As a result, even under a "clearly erroneous" standard, Cadwalader's Petition must be denied.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT'S DETERMINATION THAT A PRIMA FACIE SHOWING HAD BEEN MADE UNDER THE CRIME-FRAUD EXCEPTION

"The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought

in furtherance of an improper purpose." *United States v. Hodge & Zweig,* 548 F.2d 1347, 1354 (9th Cir. 1977). *Accord, In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co.)*, 731 F.2d 1032, 1038 (2d Cir. 1984); *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984). The rationale behind this rule is that "the client has no legitimate interest in seeking legal advice in planning future criminal activities. The crime-fraud exception therefore comes into play if 'the client consults an attorney for advice that will assist the client in carrying out a contemplated illegal or fraudulent scheme.' " *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (quoting *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977)).

Cadwalader's charge that there is no factual basis in the record for the Respondent Court's conclusion that "the decision of the magistrate is supportable under the crime/ fraud exception to the attorney-client privilege" is simply without merit. First, as Cadwalader itself admits, in the criminal proceedings before the Southern District of New York,[5] Senft was convicted on the first count of the indictment which, among other things, charged that the conspirators "created a new limited partnership, SGS

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[5]Significantly, in the Government's criminal action against Senft, the same claims of privilege Cadwalader asserts here were repeatedly rejected by the courts. Thus, for example, in denying a motion to quash the grand jury subpoena addressed to Senft's criminal attorneys, the district court noted:

> Since the records of SFI are not privileged while in the possession of Senft, they are not privileged in the hands of Wachtell, Lipton, and the movants may not rely on the attorney-client privilege to prevent production of the SFI records.

In re Grand Jury Subpoenas Addressed to Sentinel Fin. Instruments, 553 F. Supp. 71, 76 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d

[Sentinel Government Securities], of which SFI was a general partner, to market fraudulent tax benefits. To this end, the conspirators intentionally made false statements and false factual representations to the law firm [Cadwalader] which drafted tax opinion letters and private placement memoranda for SGS in 1980 and 1981 based on these false statements and false representations."

Second, the Respondent Court's finding that "Senft was convicted of a single conspiracy that included both Sentinel Government Securities ('SGS') and Sentinel Financial Instruments ('SFI')" (Petition, App. D at 6a) is directly supported by the opinion of the Second Circuit upholding that conviction.

> The district court properly instructed and left to the jury the question whether the evidence established a single conspiracy. The proof, which showed a substantial intermingling of SFI and SGS operations and employees, was sufficient to support the jury's determination that only a single conspiracy existed. The jury was instructed to disregard evidence concerning SGS in determining Antonucci's guilt, and can be presumed to have followed those instructions absent any showing to the contrary.

(App. D, *infra,* p. 19a) (citations omitted).

Further, in light of the defendants' admissions that the Partnership offered for sale within California 150 limited partnership interests yet failed to qualify these securities with the Department of Corporations, it can hardly be denied that Gottlieb has "produce[d] enough evidence to

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Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) (footnote omitted). *See also* In re Sentinel Gov't Sec., 530 F. Supp. 793 (S.D.N.Y.), *petition for mandamus denied*, 697 F.2d 297 (2d Cir.), *cert. denied*, 456 U.S. 977 (1982).

subject the attorney and the client to the 'risk of non-persuasion,' if the evidence [of a violation of Cal. Corp. Code § 25110] is left unrebutted." *In re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982*, 561 F. Supp. 1247, 1254 (E.D.N.Y. 1982). *See also Western Fed. Corp. v. Erickson*, 739 F.2d 1439, 1442 (9th Cir. 1984) (burden of proving the availability of an exemption under the securities laws lies with the party claiming the exemption); *People v. Graham*, 163 Cal. App. 3d 1159, 1169-74, 210 Cal. Rptr. 318, 325-29 (1985) (construing Cal. Corp. Code § 25102(f) (West 1977) & 10 Cal. Admin. Code § 260.102.2 (1980)).[6]

III.

THE ATTORNEY CLIENT PRIVILEGE IS INAPPLICABLE WHEN SUIT IS BROUGHT AGAINST A FIDUCIARY OR BETWEEN PARTNERS

Where " 'corporations and their officers are charged with acting inimically to the stockholder's interest, the fiduciary obligations owed to those stockholders are stronger than the policy favoring privileged communications, and the attorney-client privilege is not available in such circumstances.' " *In re Transocean Tender Offer Sec. Litig.*, 78 F.R.D. 692, 694-95 (N.D. Ill. 1978) (citations omitted). Likewise,

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[6]In this regard, Carr and Gottlieb respectfully direct the Court's attention to Appendix E in which the applicable California statutes and rule governing limited private offerings in effect at the time the limited partnership interests were offered and sold to Carr are reproduced. It was not until nearly a full year after Gottlieb's purchase of the three Units on Carr's behalf that Cal. Corp. Code § 25102(f) was amended to add a 35-purchaser "safe harbor" comparable to former SEC Rule 146, now Regulation D. 1981 Cal. Stat., ch. 1120, § 1 (eff. Nov. 1, 1981).

> *Garner v. Wolfinbarger* and *Bailey v. Meister Brau, Inc.* stand generally for the proposition that where a corporation seeks advice from legal counsel, and the information relates to the subject of a later suit by a minority shareholder in the corporation, the corporation is not entitled to claim the privilege as against its own shareholder, absent some special cause . . . . More important is the basis of those decisions, resting in each case on the understanding that a corporation is, at least in part, the association of its shareholders, and it owes to them a fiduciary obligation which is stronger than the societal policy favoring privileged communications.[7]

It requires no citation of authority that the fiduciary obligations of one partner to another are, if anything, even greater than those between a corporation and its shareholders. Thus, Cadwalader may not invoke the attorney-client privilege to shield from Carr and his attorney-in-fact, Gottlieb, their legitimate inquiries concerning the management and operations of the Partnership. The Respondent Court's alternative reasoning under the joint-client exception is therefore not clearly erroneous as a matter of law.

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[7]Valente v. Pepsico, Inc., 68 F.R.D. 361, 367-68 (D. Del. 1975) (examining Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub nom.* Garner v. First Am. Life Ins. Co., 401 U.S. 974 (1971); Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972)). *See also* Washington Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978); Broad v. Rockwell Int'l Corp., 1976-77 Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. 1977).

IV.

THE RESPONDENT COURT'S ORDER REQUIRING DISCLOSURE OF "WORK PRODUCT" WAS NOT CLEARLY ERRONEOUS AS A MATTER LAW

A. The Requested Documents Are Not Work Product Since They Were Not "Prepared in Anticipation of Litigation or for Trial."

By definition, the work product doctrine only applies to documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3). "While the issuance of opinion letters on the registration of shares might result in liability for the parties involved, this is a routine procedure necessary in the securities field and is not done with litigation in mind." *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).[8]

"The purpose of the [work product doctrine] . . . is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). As a result, "the burden of showing that the materials were prepared in anticipation of litigation is on the party asserting the privilege." *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 41 (S.D.N.Y. 1984). That burden Cadwalader failed to meet in the proceedings before Magistrate Penne, and "[i]t certainly is not clearly erroneous or contrary to law to conclude

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[8] *Cf.* Fed. R. Civ. P. 26(b)(3) advisory committee's note: "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision."

that the documents requested in the present case do not fit this description." Order ¶ 3 (Petition, App. C at 6a).

B. The Work Product Doctrine Does Not Apply When an Attorney Is Consulted as Part of a Continuing Plan to Commit a Crime or Fraud or When the Activities of Counsel Are at Issue in the Lawsuit.

"Every court of appeals that has addressed the crime-fraud exception's application to work product has concluded that it does apply." *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982). The work product doctrine is waived for client fraud even when asserted by the attorney. *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980). Indeed, particularly where, as here, "the work-product itself may be part of a criminal scheme . . . all reason for protecting it from judicial examination evaporates." *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982).

Second, to the extent that any of the documents requested do constitute work product, the doctrine is abrogated when it is the very activities of counsel of which plaintiff complains. *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968). *Accord, SEC v. National Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302, 1305-06 (D.D.C. 1974).

Third, under *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." In other words, "[a]s to an attorney's work product, its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests." *Kirkland*, 46 F.R.D. at 30. In light of then District Judge Hall's September 25,

1984 order in this action that Cadwalader may be liable under the federal securities law only if it (1) had directly participated in the misrepresentation or (2) had actual knowledge of and substantially aided in the wrong (App. C, *infra*, pp. 8a-10a), the scope and manner of Cadwalader's involvement in the transaction is critical and, in large measure, can only be proved by documents which are solely in Cadwalader's possession. Thus, Gottlieb and Carr have "a particularized and compelling need for the production of the relevant work product of these attorneys" (*A.M. Int'l, Inc. v. Eastman Kodak Co.*, 35 Fed. R. Serv. 2d 311, 313 (N.D. Ill. 1982)), and the Respondent Court did not abuse its discretion in ordering their production. *See, e.g., Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976).[9]

VI.

THE "FAILURE" OF THE RESPONDENT COURT TO CONDUCT AN IN CAMERA INSPECTION IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, DOES NOT CONSTITUTE AN ABUSE OF DISCRETION

Perhaps Cadwalader's most egregious abuse of the discovery rules in the proceedings below was its multiple

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[9]To preserve the issue should the Court grant the Petition (*see* Wiener v. United States, 357 U.S. 349, 351 n.* (1958)), Carr and Gottlieb also contend that Cadwalader waived its right to resist production by its selective disclosure of certain work product documents and by placing in issue its clients' fraud and purported compliance with the securities laws. Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981); Central Soya Co. v. Geo. A. Hormel & Co., 581 F. Supp. 51, 53 (W.D. Okla. 1982); Garfinkle, 64 F.R.D. at 689-90.

assertions of the attorney-client privilege and the work product doctrine without ever attempting to identify the documents for which the privileges were claimed. Such blanket claims of privilege are clearly improper. *FTC v. Shaffner,* 626 F.2d 32, 37 (7th Cir. 1980); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 305 (S.D.N.Y. 1982); *SEC v. Dresser Indus., Inc.*, 453 F. Supp. 573, 576 (D.D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir.), *cert. denied,* 449 U.S. 993 (1980).

As Magistrate Penne incisively observed at the September 30, 1985 hearing,

> [I]f the opposing party wishes to claim the privilege they must set out a schedule of the documents, identify the documents, who the author of the document is, who the recipient is, and on what ground the privilege is claimed, whether it's work product or attorney-client. . . . You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

(App. B, *infra*, p. 2a-3a). *Cf. Kerr,* 426 U.S. at 400 (" 'claiming a privilege should involve specifying which documents . . . are privileged and for what reasons' ").

"Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of that claim. The outcome is indefensible." *A.M. Int'l, Inc. v. Eastman Kodak Co.*, 100 F.R.D. 255, 256 (N.D. Ill. 1981). Indeed, "[a]n improperly asserted claim of privilege is no privilege at all."

International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974).[10]

Notwithstanding Cadwalader's patent failure *to this day* to identify the documents it claims are privileged, the Petitioner apparently requests this Court to reverse summarily this matter with directions that the Respondent Court conduct an *in camera* review of these documents, whatever they may be. Had Cadwalader made such an offer on June 17, 1985 when its response to Gottlieb's request for production of documents was initially due, the requested *in camera* inspection would arguably merit consideration by this Court and may indeed have obviated the need for what has now become a two-year struggle by Carr and Gottlieb to compel their production.

Yet, the only reference in the entire record that Cadwalader "specifically offer[ed] the documents for *in-camera* inspection" before the Respondent Court is one lonely sentence buried in the middle of Cadwalader's 35-page memorandum filed in support of its objections to the magistrate's order. (Petition at 5 & n.2). In sum, Cadwalader's purported offer of an *in camera* inspection was not made until after Magistrate Penne had already ruled on Gottlieb's motion to compel, the "offer" was apparently limited only to attorney-client communications and did not include work product, and, clearly, none of the parties briefed this issue during the proceedings in the Respon-

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[10] *Compare* United States Dep't of Energy v. Crocker, 629 F.2d 1341 (Temp. Em. Ct. App. 1980) (district court erred in declining DOE's proffer of *in camera* review when DOE had prepared "a detailed index of the withheld documents and the privilege claimed as to each") *with* Coastal Corp. v. Duncan, 86 F.R.D. 514, 522-24 (D. Del. 1980), *cited with approval in* Crocker, 629 F.2d at 1345 n.* (district judge had no necessity to review documents when DOE had failed to raise privilege claims properly).

dent Court. As a result, Cadwalader's request for an *in camera* review is not properly before this Court. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Kerr*, 426 U.S. at 405 n.9; *Country Fairways, Inc. v. Mottaz*, 539 F.2d 637, 642 (7th Cir. 1976) ("an issue not presented in the court below cannot be raised for the first time on appeal and form a basis for reversal").

Further, while this Court — as well as the Ninth Circuit (*In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985)) — has commended the judicious use of *in camera* proceedings to resolve disputed issues of privilege, at least in civil matters a party does not have a right as a matter of course to demand an *in camera* review; rather, the matter lies within the sound discretion of the trial court. *See Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984); *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982). *See also Hayden v. Maldonado*, 110 F.R.D. 157, 160 (N.D.N.Y. 1986) (magistrate did not have to review files *in camera* when objecting party "failed to comply with *Kerr*" by interposing privilege objections in blanket fashion). The "failure" of the Respondent Court to conduct an *in camera* inspection would not, in any event, constitute an abuse of discretion "amounting to a judicial usurpation of power" as to justify mandamus review. *Allied Chem. Corp.*, 449 U.S. at 35; *Will v. United States*, 389 U.S. at 95; *In re Bankers Trust Co.*, 775 F.2d at 547.

CONCLUSION

For the foregoing reasons, the Petitioner has not shown that its right to issuance of a writ is clear and indisputable. The Petition should therefore be denied. Indeed, Carr and Gottlieb further submit that Cadwalader's petition

for writ of certiorari is frivolous or interposed solely for purposes of delay and that appropriate damages under Supreme Court Rule 49.2 or 28 U.S.C. § 1927 should be awarded.

Respectfully submitted,

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May 18, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7357

DC # CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DANIEL M. GOTTLIEB,
Real Party in Interest.

ORDER

[Filed Aug. 4, 1986]

Before: FARRIS, PREGERSON and WIGGINS, Circuit Judges

This petition for writ of mandamus requires further consideration under Fed. R. App. P. 21(b). Within 14 days of the entry of this order, petitioner shall submit an additional three copies of its petition and exhibits. Answers to the petition shall be filed within 28 days of the entry of this order. Petitioner may file a reply memorandum within 42 days of the entry of this order.

Upon completion of briefing, this matter will be submitted to the next regular motions panel for decision.

APPENDIX B

EXTRACT FROM DECLARATION OF PAMELA M. WOODS FILED IN THE UNITED STATES DISTRICT COURT, BEING A TRANSCRIPTION OF THE HEARING BEFORE MAGISTRATE PENNE ON SEPTEMBER 30, 1985

* * * *

Magistrate Penne: ... Now, then. Category No. 1. Request No. 1 is denied. And Request No. 2 is denied. Request No. 3 is denied. Now, Request No. 23. Did the defendant have any particular argument directed to this ....

Mr. Merring: [Counsel for Carr and Gottlieb]: Your honor, may I ask the reason for the ....

Magistrate Penne: They're too broad. They're not limited to this particular transaction that is involved at issue in this case.

Mr. Merring: Is it just on the grounds of overbreadth?

Magistrate Penne: Well. If you're, if you're bringing up the question of attorney-client privilege and work product ....

Mr. Merring: Yes, your honor.

Magistrate Penne: Well I think your point is well taken with respect to those privileges that if the opposing party wishes to claim the privilege they must set out a schedule of the documents, identify the documents, who the author of the document is, who the recipient is, and on what ground the privilege is claimed, whether it's work product or attorney-client. Now there's ample authority been cited by plaintiff in this particular case and there's

lot of other authority too. You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-7340-CHH

ALLAN CARR,
Plaintiff,

v.

SENTINEL GOVERNMENT SECURITIES, *et al.*,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS, DENYING DEFENDANT CADWALADER, WICKERSHAM & TAFT'S MOTIONS FOR CHANGE OF VENUE AND FOR SANCTIONS AND DISCOVERY

[Entered Sept. 26, 1984]

Defendants' motions to dismiss, defendant Cadwalader, Wickersham & Taft's ("Cadwalader") motion for change of venue to the Southern District of New York, and Cadwalader's motion for sanctions and discovery pursuant to Fed. R. Civ. P. 11 are now before the Court. The Court has considered the evidence presented, the points and authorities submitted by the parties, and the oral argument of counsel.

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted in part and denied in part, Cadwalader's motion for change of venue is denied, and Cadwala-

der's motion for sanctions and discovery is denied. This Order is based on the following:

1. This Court retains jurisdiction over all claims alleged. Plaintiff has sufficiently alleged subject matter jurisdiction under the Securities Act of 1933 (the "1933 Act"), and the Securities Exchange Act of 1934 (the "1934 Act"). Under the doctrine of pendent jurisdiction and the analysis of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), this Court also has jurisdiction over the plaintiff's state law claims. These state law claims arise from a common nucleus of operative facts. Whatever additional facts may be required to establish the state law claims for malpractice and breach of fiduciary duty are insignificant compared to the common facts. Trial of the state law claims in a separate state proceeding would be unfair to the parties and a waste of judicial resources.

2. For purposes of the defendants' motions to dismiss, plaintiff's second claim for relief, misrepresentation under § 11 and § 12(2) of the 1933 Act, is not barred by the applicable statute of limitations. Plaintiff's first complaint is admissible at trial as a prior inconsistent statement, but superseded pleadings are not conclusive judicial admissions at the pleadings stage. *Raulie v. United States*, 400 F.2d 487, 526 (10th Cir. 1968). Claims under § 11 and § 12(2) are governed by § 13 of the 1933 Act and the federal doctrine of equitable tolling. *SEC v. Seabord Corp.*, 677 F.2d 1289, 1293-94 (9th Cir. 1982). Section 13 requires that an action brought under § 11 or § 12(2) be brought within "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence," but in no event "more than three years after the sale." 18 U.S.C. § 77m. Since plaintiff's first complaint is not an admission for purposes of pleading, whether

plaintiff discovered the alleged misrepresentations or omissions or should have discovered them by reasonable diligence remains a question for the trier of fact. This Court also notes that it sees no basis for applying the tolling provisions of Cal. Code of Civ. P. § 351 to prevent plaintiff's second claim from being barred by § 13 if it is later shown that plaintiff discovered the alleged misrepresentations more than one year before the filing of this cause of action.

3. Plaintiff's first, third and fifth claims are also timely. Plaintiff's first claim for relief, failure to register under Cal. Corp. Code § 25110, is governed by the statute of limitations of Cal. Corp. Code § 25507 which requires actions to be brought within two years of the violation of § 25110 or one year of discovery, whichever expires first. Plaintiff's third and fifth claims for relief, misrepresentation under Cal. Corp. Code §§ 25400-02, are governed by the statute of limitations in Cal. Corp. Code § 25506 which requires actions to be brought within four years of the alleged wrongful misrepresentation or one year of discovery, whichever occurs first. Even though plaintiff has not met the two years from violation requirement of § 25507, and even though defendants may later establish that plaintiff has not met the one year from discovery requirement of § 25506, plaintiff's first, third and fifth claims are still timely because of the operation of Cal. Code Civ. P. § 351. Under Cal. Code Civ. P. § 351 ("§ 351"), the statutes of limitations in question were tolled for the entire time the defendants were not in the State of California. This is true even though defendants were subject to service of process and personal jurisdiction, *Dew v. Appleberry*, 23 Cal. 3d 630, 153 Cal. Rptr. 219 (1979), and even though defendants are not California residents, *Cvevich v. Giardino*, 37 Cal. App. 2d 394, 99 P.2d 573 (1940). Furthermore, the operation of Cal. Corp.

Code § 25550 and the decision of *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 250 P.2d 651 (1952), do not affect the application of § 351 in this case. Section 25550 appoints the Commissioner of Corporations as an agent for service of process only when there is conduct prohibited by the Corporate Securities Law of 1968 and personal jurisdiction over the alleged wrongdoer "cannot otherwise be obtained." Since personal jurisdiction over the defendants was available no agent was appointed. The *Loope* decision recognized that foreign corporations "doing business" in the state which were subject to substitute service of process through the Secretary of State or another designated agent within California were not absent from the state for purposes of § 351. 250 P.2d at 652. Since defendants in this case were not doing business in California and Cal. Corp. Code § 25550 did not operate to appoint an agent within the state, the reasoning of *Loope* is inapplicable to the present case.

4. Plaintiff's eighth claim, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*, is also timely. This claim is governed by the three-year statute of limitations of Cal. Code Civ. P. § 338. *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984). Since this action was filed within three years of the sale to plaintiff it is timely under Cal. Code Civ. P. § 338.

5. Plaintiff's complaint complies with the mandate of Fed. R. Civ. P. 9(b) that fraud be alleged with particularity. Defendants are appraised of which representations Carr claims are false or misleading, and the time and manner in which such representations were allegedly made.

6. Plaintiff's complaint adequately states a cause of action for malpractice. Under California law an attorney

owes a duty to third parties who are intended recipients of information provided to a client. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

7. Plaintiff's second claim for relief, misrepresentation under § 11 and § 12(2) of the 1933 Act, fails to state a cause of action only to the extent that it alleges aiding and abetting liability against defendant Cadwalader. This Court agrees with the reasoning and conclusion of Judge Pfaelzer in *Hokama v. E. F. Hutton & Co., Inc.*, 566 F. Supp. 636 (C.D. Cal. 1983), that aiding and abetting liability is not available under § 12(2) because it is inconsistent with the objective of § 12(2) to regulate sellers. This does not preclude plaintiff from recovering from Cadwalader under § 12(2) by establishing that Cadwalader was a "participant" in the sale, and therefore liable to plaintiff as a seller. *SEC v. Seaboard Corp.* (Jones), 677 F.2d 1289, 1294-95 (1982). In order to establish that defendant Cadwalader was a participant, plaintiff will have to show that his injury resulted directly and proximately from the actions of Cadwalader. *Id.* at 1294; *see, e.g., Junker v. Crory*, 650 F.2d 1349, 1360-61 (5th Cir. 1981) (corporate attorney involved in negotiations found a "seller" within § 12(2)).

8. Plaintiff's fourth claim for relief, misrepresentation under § 17 of the 1933 Act, § 10 of the 1934 Act, Rule 10b-5, and § 206 of the Investment Advisers Act, fails to state a cause of action against defendant Cadwalader only to the extent that it seeks recovery for aiding and abetting under these sections for reckless conduct by Cadwalader. First, under these sections as under § 12(2) above, Cadwalader may be liable to plaintiff as a participant, if its participation in the misrepresentation was direct, and if it knew or was reckless in not knowing that there was a

material misrepresentation. *SEC v. Seaboard Corp.* (Hugh Johnson), 677 F.2d 1301, 1312 (9th Cir. 1982). Second, liability for aiding and abetting is available under Rule 10b-5 and § 17 upon a showing that Cadwalader had knowledge of the wrong, and substantially assisted in the wrong. *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S. Ct. 89. However, plaintiff cannot recover from Cadwalader as an aider and abettor merely by showing that Cadwalader was reckless in not knowing of the wrong. Plaintiff refers to the *Harmsen* and *Seaboard Corp.* (Hugh Johnson) decisions to argue that, because Cadwalader owed a duty to the intended beneficiaries of the information it provided, proof of recklessness by Cadwalader can support aiding and abetting recovery. In *Harmsen* the Ninth Circuit held that the elements of aiding and abetting liability under 10b-5 are "(1) the existence of an independent primary wrong; (2) *actual knowledge* by the alleged aider and abettor of the wrong and his or her role in furthering it; and (3) substantial assistance in the wrong." *Id.* (emphasis added). The *Harmsen* court gave no indication that a recklessness standard would suffice, although it did note that some courts have allowed aiding and abetting recovery on a showing of recklessness where a direct fiduciary duty was owed to the injured party by the alleged aider and abettor. *Id.* at 944 n.10. The *Seaboard Corp.* (Hugh Johnson) decision does not support plaintiff's position either. Any indication by the court that recklessness would support a cause of action for aiding and abetting must be disregarded in light of the specific statement that the court was not "confronting" the aiding and abetting issue. 677 F.2d at 1311 n.12. Finally, even if recklessness is used as a basis for aiding and abetting recovery, and this Court thinks that it should not be, the present case is not the type of direct fiduciary duty which calls for the

recklessness standard. Cadwalader's only duty to plaintiff was as the recipient of legal information, not as a client. Those circuits which have imposed aiding and abetting liability for reckless behavior have limited the theory's availability to cases where the alleged aider and abettor owed a "direct fiduciary duty" to the injured party. *See, e.g., Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039. Application of a recklessness standard in this case would make attorneys who issue tax opinions and offering memorandums guarantors of the facts which their clients provide them and impose a duty to investigate on such attorneys which would significantly increase the cost of legal advice. It is enough, as provided in *Harmsen*, that such attorneys are liable if they have actual knowledge of the wrong.

9. Plaintiff's allegations of recklessness in his sixth claim, fraud and deceit under state law, sufficiently state a cause of action. In California the statutory definitions of fraud, Cal. Civ. Code §§ 1571-73, and deceit, Cal. Civ. Code §§ 1709-10, include recklessness and even negligence among the degrees of scienter which can support these actions. *See* Cal. Civ. Code §§ 1572(2)(5), 1710(2). California courts have recognized that recklessness is sufficient to state a cause of action under a theory of either fraud or deceit. *Gonsalves v. Hodgson*, 38 Cal. 2d 91, 237 P.2d 656, 662 (1951); *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 122 Cal. Rptr. 732, 738 (1975).

10. Plaintiff's request for punitive damages in his seventh claim, negligent misrepresentation under state law, is insufficient. Plaintiff's claim for punitive damages in his sixth claim, fraud and deceit under state law, is sufficient only to the extent that it requests punitive damages for intentional fraud or deceit. As noted above,

see ¶ 9, reckless and negligent misrepresentations can serve as the basis of a fraud or deceit action in California. To recover punitive damages, however, plaintiff must also meet the requirements of Cal. Civ. Code § 3294 ("§ 3294"). Section 3294 was amended in 1980 to specify the type of fraud or deceit which can serve as the basis for punitive damages. Stats. 1980, c. 1242, p. 4217, § 1. Section 3294(3) now defines fraud for the purposes of § 3294 as an "intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Thus, only that portion of plaintiff's seventh claim which alleges intentional fraud or deceit can serve as a basis for recovery of punitive damages under § 3294.

11. Plaintiff's claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, is insufficient to state a cause of action. Plaintiff has failed to identify an organization satisfying the enterprise requirement of RICO. 18 U.S.C. § 1961(4). Plaintiff has named one individual and several corporate or partnership entities as RICO defendants. Plaintiff, however, has failed to allege whether there was an ongoing enterprise which all of these defendants associated with, or whether these defendants invested in one or more legitimate enterprises with racketeering proceeds. Absent clearer allegations of the structure of the enterprise or enterprises, the RICO defendants are not given adequate information from which to plan a defense. *See Seville Industrial Machinery Corp. v. Southmost Industrial Machinery Corp.*, 567 F. Supp. 1146 (D. N.J. 1983). Plaintiff is also advised that this Court will allow plaintiff leave to amend to specify the exact amount of expenses incurred in complying with the IRS audit. *See* Complaint ¶ 74.

However, in repleading the RICO claim plaintiff should specify whether it is just these expenses or whether it is these expenses plus the $1.8 million claim which plaintiff is seeking to have trebled under the RICO claim. Finally, both parties are advised that this Court is not disposed to follow the reasoning of the recent Second Circuit decisions of *Bankers Trust Co. v. Rhoades*, ____ F.2d ____ (2d Cir. 1984) or *Sedima v. Imrex Co., Inc.*, ____ F.2d (2d Cir. 1984).

12. Defendants' motions to dismiss plaintiff's first amended complaint are granted as to: (1) that portion of plaintiff's second claim for relief which seeks recovery for aiding and abetting under § 12(2) of the 1933 Act; (2) that portion of plaintiff's fourth claim for relief which seeks recovery for aiding and abetting on a theory of recklessness; (3) that portion of plaintiff's sixth claim which seeks recovery of punitive damages for reckless or negligent conduct; (4) that portion of plaintiff's seventh claim which seeks recovery of punitive damages; and (5) all of plaintiff's eighth claim. In all other respects such motions are denied. By this Order defendants are now required to go forward with this proceeding by filing answers to the first amended complaint on or before October 15, 1984. The granting of defendants' motion as to the eighth claim, RICO, is without prejudice to plaintiff's right to amend. All other portions of plaintiff's first amended complaint which are dismissed are dismissed with prejudice. Plaintiff must file any amendment of the RICO claim on or before October 15, 1984. Defendants may oppose any amended claim under RICO on or before November 5, 1984.

13. Cadwalader's motion for change of venue to the Southern District of New York is denied. Change of venue pursuant to 28 U.S.C. § 1404(a) is discretionary with this

Court. Plaintiff has shown sufficient connections with the Central District of California. The only evidence of inconvenience to defendant Michael Senft before this Court comes from secondhand statements that he is incarcerated in New York. There is no indication that Mr. Senft could not be held in federal prison in California during the course of the trial, or that Mr. Senft could attend a trial in New York. Having considered the convenience of the parties and the convenience of all witnesses, this Court declines to transfer venue.

14. Cadwalader's motion for sanctions pursuant to Fed. R. Civ. P. 11 is denied. Plaintiff's first complaint and plaintiff's first amended complaint are in conflict. The change may indicate that plaintiff's counsel could have thought through their claims more fully, but it is no different than an amendment to add a new cause of action. There is no evidence that the inquiry of Carr's counsel before the first complaint was less than reasonable, or that the allegations in the first complaint or the first amended complaint were made in bad faith.

Dated: September 25, 1984.

/s/ CYNTHIA HOLCOMB HALL

CYNTHIA HOLCOMB HALL
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, One Thousand Nine Hundred and Eighty-five.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
Circuit Judges.

84-1254, 84-1264, 84-1281, 84-1286

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL SENFT, WALTER ORCHARD,
JOSEPH ANTONUCCI, and DAVID SENFT,
Defendants-Appellants.

ORDER

[Filed Mar. 29, 1985]

Michael Senft, Walter Orchard, Joseph Antonucci and David Senft appeal from judgments of conviction which followed a jury trial in the United States District Court for the Southern District of New York before Judge Owen. All four appellants were found guilty of conspiracy to defraud the United States through fraudulent tax shelter schemes and of aiding and assisting the filing of

false tax returns. Additionally, Michael Senft was convicted of personal income tax evasion.

The fraudulent schemes involved phantom trading in government securities, rigged so as to give investors apparent tax losses, together with the phony documentation and misleading representations that were an essential part of the fraudulent transactions. The trading purportedly was done by two limited partnerships, Sentinel Financial Instruments (SFI) and Sentinel Government Securities (SGS). The aiding and assisting counts resulted from the filing of false returns by investors and by Michael Senft himself.

The Government's proof, which we need not recount, convincingly established appellants' guilt on all the counts on which they were convicted. There is no merit in appellants' contention that the conduct which furnished the basis for the conspiracy conviction was not criminal in nature. The sham transactions, which had no economic effect and whose only purpose was tax avoidance, were legally insufficient to justify the tax benefits that were promised and claimed. *See Knetsch v. United States*, 364 U.S. 361 (1960); *United States v. Ingredient Technology*, 698 F.2d 88, 93-97 (2d Cir.), *cert. denied*, 103 S. Ct. 3011 (1983); *Lynch v. C.I.R.*, 273 F.2d 867, 871-72 (2d Cir. 1959); *United States v. Winograd*, 656 F.2d 279, 283 (7th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *United States v. Clardy*, 612 F.2d 1139, 1151-53 (9th Cir. 1980).

Appellants' numerous claims of procedural error are equally without merit. The district court did not err in permitting the Government to introduce evidence derived from the police search of the SFI and SGS office. Assuming for the sake of argument that at least one of the appellants had a sufficient privacy interest in the premises to be able to challenge the search, the challenge must

fail. A magistrate's finding of probable cause is entitled to substantial deference. *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983). Based on the affidavit of an I.R.S. agent, which set forth detailed information secured from a former executive of both SFI and SGS concerning the method of operation of the two firms, the magistrate properly could find that fraud so permeated the operations as to justify the search and seizure of the business records described. *See National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980). Having failed to make a substantial showing that statements necessary to the finding of probable cause were recklessly or intentionally false, appellants were not entitled to a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). The warrants themselves did not lack sufficient particularity. *United States v. Mankani*, 738 F.2d 538, 546 (2d Cir. 1984); *National City Trading Corp. v. United States*, *supra*, 635 F.2d at 1026.

The district court correctly instructed the jury that the losses claimed would be fraudulent if the jury found that the challenged transactions "in their totality . . . were not intended to have and in fact had no economic substance and were entered into solely for the purpose of tax avoidance." *See United States v. Ingredient Technology*, *supra*, 698 F.2d at 93-97 & n.9. Appellants contend that, because a few trades actually were conducted, the jury was precluded from finding a lack of beneficial interest. However, "it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

A detailed discussion of the challenged evidentiary rulings of the district court is unnecessary because of the

lack of substance in appellants' numerous claims of error. "Absent abuse of discretion, evidentiary rulings will rarely be disturbed on appeal." *United States v. Asbury*, 586 F.2d 973, 978 (2d Cir. 1978). We see no abuse of discretion or prejudicial error in any of the rulings complained of. The district court properly admitted the letters and lists of SFI and SGS salesmen as sufficiently authenticated agents' admissions, Fed. R. Evid. § 901(a), and other challenged documents as records kept in the ordinary course of business, Fed. R. Evid. § 803(6).

On the other hand, the district court properly barred certain records of appellants' auditors, which were based on false information furnished by appellants and also contained a large measure of inadmissible hearsay. Insofar as the records may have tended to show the auditors' state of mind, their offer was directed towards an irrelevant issue. The legality of appellants' conduct was for the jury to determine on the basis of facts proven on the trial. There is no proof that appellants relied upon the auditors' beliefs and, in the face of the overwhelming proof of knowing and intentional fraud, such reliance could not be inferred. *See United States v. King*, 560 F.2d 122, 132 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977). This fact was correctly recognized by the district court when it refused to charge the jury on the issue of good faith reliance. *Id.* Conversations between an outside firm and its attorneys concerning the transaction of business with SGS was also properly excluded for similar reasons.

The district court's refusal to admit the testimony of more than two expert defense witnesses constituted proper management of the case.

John Lane's tape recordings of his conversations with appellant Orchard concerning some of the transactions at issue herein did not fall under the ban of 18 U.S.C.

§ 2511(2)(d) as having been made "for the purpose of committing any criminal or tortious act." Lane's purpose in making the recording was simply to protect the interests of his own firm should SFI and SGS attempt to breach their contract. *See Moore v. Telfon Communications Corp.*, 589 F.2d 959, 965-66 (9th Cir 1978).

There is no substance in appellant's claims of prosecutorial misconduct. Information reported in the press was available in most instances from public proceedings and reported decisions. *See, e.g., In re SGS*, 530 F. Supp. 793 (S.D.N.Y.), *appeal dismissed* (2d Cir.), *cert. denied*, 456 U.S. 977 (1982); *In re Grand Jury Subpoenas Addressed to SFI*, 553 F. Supp. 71 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983). Appellants have not shown that any non-public information was released in such a manner as to have improperly influenced the jurors.

Appellants' *Brady* claim lacks merit. Appellants had full knowledge of the persons whose statements are at issue and the information available to those persons and thus were in a position themselves to call the witnesses and to take advantage of any exculpatory testimony they might furnish. *United States v. LeRoy*, 687 F.2d 610, 618-19 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

The district court did not err in concluding that the Government's rebuttal summation was properly based on the record. To the extent, if any, that the prosecutor suggested any inferences not fully supported by the evidence, in view of the overwhelming proof of appellants' active and knowing participation in the fraudulent tax scheme, such transgression as may have occurred was harmless.

We reject appellant Antonucci's contention that he could not have been a participant in a conspiracy that involved fraud by both SFI and SGS, because he left SFI before SGS was formed. The district court properly instructed, *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), and left to the jury, *United States v. Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), *cert. denied*, 104 S. Ct. 134 (1983), the question whether the evidence established a single conspiracy. The proof, which showed a substantial intermingling of SFI and SGS operations and employees, was sufficient to support the jury's determination that only a single conspiracy existed. The jury was instructed to disregard evidence concerning SGS in determining Antonucci's guilt, and can be presumed to have followed those instructions absent any showing to the contrary, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 367 (1963).

Antonucci also fails in his contention that, because he resides outside the Southern District of New York and the customers whom he is charged with aiding and assisting filed their tax returns by mail, he was entitled to be tried in the district of his residence. *See* 18 U.S.C. § 3237(b). The district court correctly denied Antonucci's request for change of venue, relying on *In re United States (Clemente)*, 608 F.2d 76 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980), which held that section 3237(b) applies only where, unlike here, venue is predicated on the use of the mails.

The jury's verdict was properly rendered. Six days after beginning deliberations, the jury passed a note to the court stating that it could not reach a unanimous verdict. After informing counsel that he was prepared to take a partial verdict and receiving no objection, Judge Owen asked the jury whether they had reached a verdict

on any count. The foreman asked for more time to deliberate, because the jury was making progress. Later that day, the jury sent a note stating that it had reached unanimous decision on some counts but not others and that further deliberations would not prove effective. The jury was called into court, the verdict was read, and the jurors were polled.

It is well established that a jury may be allowed to return a partial verdict as to some defendants or some counts. *United States v. Cotter,* 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932); Fed. R. Crim. P. 31(b). Nothing in the instant case indicates that the jury's partial verdict was intended to be anything but final, and the district court correctly treated it as such. Although the jury later inquired whether each of the counts should be judged collectively or individually, this does not indicate that the jury was reassessing appellants' guilt on the counts already decided. Likewise, the note from a juror indicating that she had felt pressured and had changed her convictions, furnishes no basis to challenge the unanimously rendered partial verdict. *United States v. Hockridge*, 573 F.2d 752, 756-60 (2d Cir.), *cert. denied*, 435 U.S. 821 (1978).

Appellant Michael Senft's contention that, in fixing his sentence, the district court impermissibly considered his protestations of innocence throughout the trial, is meritless. The court's statement upon sentencing, on which appellant relies, merely expressed regret at Senft's apparent lack of remorse, a valid sentencing criterion. *United States v. Grayson*, 438 U.S. 41 (1978).

We have fully considered all of appellants' contentions, including any not discussed in the above paragraphs, and find no merit in any of them. The judgments of conviction are affirmed. Mandate shall issue forthwith.

/s/ WM. H. TIMBERS

HON. WILLIAM H. TIMBERS

/s/ ELLSWORTH A. VAN GRAAFEILAND

HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ LAWRENCE PIERCE

HON. LAWRENCE W. PIERCE

N.P. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX E

THE STATUTES, RULES AND REGULATIONS THE CASE INVOLVES

FEDERAL RULES:

Federal Rule of Civil Procedure 26(b)(3)

> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. . . .

Federal Rule of Evidence 501

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts

of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

CALIFORNIA STATUTES:

California Corporations Code § 25102(f) (West 1977), *amended by* 1981 Cal. Stat., ch. 1120, § 1 (effective Nov. 1, 1981)

The following transactions are exempted from the provisions of Section 25110:

* * *

(f) Any offer or sale, in a transaction not involving any public offering, of any bona fide general partnership, joint venture or limited partnership interest, or any beneficial interest in a trust which is a "security" within the meaning of Section 25019, if in the case of such beneficial trust interests immediately after the sale and issuance they are owned by no more than five persons.

California Corporations Code § 25110 (West 1977)

It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security

or transaction is exempted under Chapter 1 (commencing with Section 25100) of this part.

California Corporations Code § 25504 (West 1977)

Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

California Corporations Code § 25504.1 (West Supp. 1987)

Any person who materially assists in any violation of Section 25110, 25120, 25130, 25133, or 25401, or a condition of qualification under Chapter 2 (commencing with Section 25110) of Part 2 of this division imposed pursuant to Section 25141, or a condition of qualification under Chapter 3 (commencing with Section 25120) of Part 2 of this division imposed pursuant to Section 25141, or an order suspending trading issued pursuant to Section 25219, with intent to deceive or defraud, is jointly and severally liable with any other person liable under this chapter for such violation.

CALIFORNIA ADMINISTRATIVE CODE:

10 Cal. Admin. Code § 260.102.2 (1980)
(amended effective Nov. 1, 1981)

For the purposes of Subdivisions (e) and (g) of Section 25102 and Subdivision (a) of Section 25104 of the Code, an offer or sale, and for the purposes of Subdivision (f) of Section 25102, an offer or sale of any bona fide general partnership, joint venture or limited partnership interest, does not involve any public offering if offers are not made to more than 25 persons and sales are not consummated to more than 10 of such persons, and if all of the offerees either have a preexisting personal or business relationship with the offeror or its partners, officers, directors or controlling persons or by reason of their business or financial experience could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction. The number of offerees and purchasers referred to above is exclusive of any described in subdivision (i) of Section 25102 of the Code and a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person. This section does not create any presumption that a public offering is involved in offers not conforming to this section, and the determination of whether or not a transaction not covered by this section involves a public offering shall be made without reference to this section.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 18, 1986, I served the within Brief In Opposition to Petition for a Writ of Certiorari in re: "Cadwalader, Wickersham & Taft vs. United States District Court of the Central District of California" in the United States Supreme Court, October Term 1986, No. 86-1639;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

The Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

The Honorable William D. Keller
United States District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

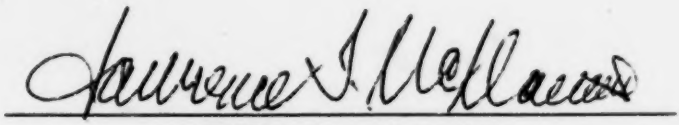
The Honorable Erwin N. Griswold
Jones, Day, Reavis & Pogue
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701

Susan L. Hoffman, Esq.
Tuttle & Taylor
355 South Grand Avenue
Los Angeles, California 90071

All Parties Required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 18, 1987, at Los Angeles, California



LAWRENCE T. McMANUS